Supreme Court, U. S.
FILED
SEP 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-477

WEST SIDE WOMEN'S SERVICES, INC., and RICHARD J. DERMAN, M.D., INC.,

Petitioners,

v.

CITY OF CLEVELAND, OHIO, CITY COUNCIL OF CLEVELAND, OHIO, LOUIS CIVITTOLD, Commissioner of Assessments and Licenses, RONALD SWANGER, M.D., Director of Public Health & Welfare, DENNIS KUCINICH, Mayor, ROBERT E. GETZ, City Councilman, RALPH J. PERK, THOMAS M. KEANE, individually and in their official capacities, their agents, successors in interest, and those acting in concert with them,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROY LUCAS, P.C.
Suite 604
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 338-6955
Attorneys for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CITY ORDINANCE AT ISSUE 3

RELATED ORDINANCE 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

I. The Decision Below is in Sharp Conflict with *Roe v. Wade*, *Sendak v. Arnold*, and *Moore v. City of East Cleveland*, because it Upholds the Exclusion of First Trimester Abortion Services from Areas Zoned to Allow All Other Medical and Professional Practices 8

II. The Petition Raises Important, Recurring Questions on the Relationship Between *Roe v. Wade* and *Maher v. Roe* in the Context of Numerous New City Ordinances Throughout the United States that Attempt to Regulate, Zone, and Otherwise Restrict the Functioning of Abortion Services 11

III. This Court Should Review the Judgment Below Because the Denial of Injunctive Relief is an Abuse of Discretion that Jeopardizes the Effective Exercise of Fundamental Privacy Rights 13

CONCLUSIONS 14

APPENDIX:

– Order of the United States Court of Appeals for the Sixth Circuit, filed August 15, 1978 . . . . . 1a

– Order and opinion of the United States District Court for the Northern District of Ohio, filed March 1, 1978, and reported as 450 F. Supp. 796 . . . . . 3a

TABLE OF AUTHORITIES

Page

Constitutional Provisions:

United States Constitution – Amendment XIV 3

Statutes and Ordinances:

Federal:

U.S. Code, Tit. 28, §1254(1) 2

U.S. Code, Tit. 28, §1331 7

U.S. Code, Tit. 28, §1343 7

U.S. Code, Tit. 28, §1983 7

State And City:

Cleveland Ordinances, Sec. 231.01 (Dec. 10, 1973) 3

Cleveland Ordinances, Sec. 231.09 (Jul. 18, 1977) 2, 3, 11

Cleveland Ordinances, Sec. 343.01 (May 23, 1967) 4

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 2

Buchanan v. Warley, 245 U.S. 60 (1917) 10

Doe v. Bolton, 410 U.S. 179 (1973) 8, 10, 11

Doran v. Salem Inn, 422 U.S. 922 (1974) 13

Eisenstadt v. Baird, 405 U.S. 438 (1972) 10

Fox Hill Surgery Clinic v. City of Overland Park, Civ. No. 77-4120 (D. Kan. July 11, 1977) 12

Framingham Clinic v. Board of Selectmen, 367 N.E.2d 606 (Mass. 1977) 12

Friendship Medical Center, Ltd. v. Chicago Board of Health, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975) 12

Griswold v. Connecticut, 381 U.S. 479 (1965) 10

Maher v. Roe, 432 U.S. 464 (1977) 7, 8, 9, 10, 11

Cases, continued: Page

Mahoning Women's Center v. Hunter, 444 F. Supp. 12 (N.D. Ohio 1977) 6, 12

Mobile Women's Medical Clinic v. Board of Commissioners, 426 F. Supp. 331 (S.D. Ala. 1977) 12

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 2, 7, 9, 10

Nichol v. Kennan, 404 U.S. 1055 (1972) (per curiam), aff'g 326 F. Supp. 613 (W.D. Wis.) 14

Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977) 12, 13

Planned Parenthood v. Danforth, 420 U.S. 918 (1975) (per curiam), aff'd, 428 U.S. 52 (1976) 9, 13

Roe v. Wade, 410 U.S. 113 (1973) 2, 7, 8, 10, 11

Sendak v. Arnold, 429 U.S. 968 (1976), aff'g mem. 416 F. Supp. 22 (S.D. Inc.) (three-judge court) 7, 9, 11, 12

Singleton v. Wulff, 428 U.S. 106 (1976) 9

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 10

West Side Women's Service, Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio), aff'd, ___ F.2d ___ (6th Cir. 1978) (No. 78-3160) . . . 2, 6, 7, 8, 10, 14

Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

WEST SIDE WOMEN'S SERVICES, INC., and RICHARD J. DERMAN, M.D., INC.,

Petitioners,

v.

CITY OF CLEVELAND, OHIO, CITY COUNCIL OF CLEVELAND, OHIO, LOUIS CIVITTOLD, Commissioner of Assessments and Licenses, RONALD SWANGER, M.D., Director of Public Health & Welfare, DENNIS KUCINICH, Mayor, ROBERT E. GETZ, City Councilman, RALPH J. PERK, THOMAS M. KEANE, individually and in their official capacities, their agents, successors in interest, and those acting in concert with them,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

West Side Women's Services, Inc., and Richard J. Derman, M.D., respectfully petition this Court for a writ of certiorari to review the August 15, 1978, judgment of the court of appeals which affirmed the denial by the district court of a preliminary injunction sought by petitioners to

enable them to open a first trimester abortion service in a locality where any other medical service may be located, but where abortion alone is excluded by the recent ordinance in question.

OPINIONS BELOW

The August 15, 1978, order and opinion of the United States Court of Appeals for the Sixth Circuit has not yet been reported. A copy is included in the Appendix, *infra*, at 1a-2a.

The March 1, 1978, opinion of the United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, has been officially reported as *West Side Women's Services, Inc. v. City of Cleveland*, 450 F. Supp. 796 (N.D. Ohio 1978). A copy is set out in the Appendix, *infra*, at 3a-7a.

JURISDICTION

(i) The United States Court of Appeals issued and filed its order on August 15, 1978. The order constitutes judgment of that court. (App. 1a).

(ii) Petitioners sought no rehearing, and made no requests for additional time to file this petition.

(iii) Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. § 1254 (1). Cases supporting jurisdiction include: *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Roe v. Wade*, 410 U.S. 113 (1973); *Moore v. City of Cleveland*, 431 U.S. 494 (1977).

QUESTIONS PRESENTED

I.

Whether Section 231.09 of the Cleveland ordinances violates the due process clause of the Fourteenth Amend-

ment by excluding any abortion service from "local retail business districts" in which all other "dental, medical or other established recognized professions" may be located, and where all other forms of minor, outpatient surgery except abortions may be performed?

II.

Whether the exclusion of abortion services from areas zoned to allow all other medical and professional services violates the equal protection clause of the Fourteenth Amendment?

III.

Whether the District Court abused its discretion by denying preliminary injunctive relief when irreparable injury and a high probability of success on the merits were present?

CITY ORDINANCE AT ISSUE

"WHEREAS, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department and for the immediate preservation of the public health, safety and welfare; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CLEVELAND:

Section 1. That the Codified Ordinances of the City of Cleveland, Ohio 1976, be and the same hereby are supplemented by enacting new Section 231.09 thereof, to read as follows:

Section 231.09 *Prohibition Against Issuing Abortion Service License*[1] *in Local Retail Business District.*

---

[1] In this action plaintiffs did not contest the remainder of Chapter 231 which generally regulates abortion services.

Notwithstanding any other provisions of the Codified Ordinances of the City of Cleveland, no license, required under the provisions of Section 231.06, of the Codified Ordinances of the City of Cleveland, shall be issued for an abortion service to be located in a local retail business district as set forth in Section 343.01 of the Codified Ordinances of the City of Cleveland, and *no abortion service shall operate in a local retail business district.*

Section 2. That this ordinance is hereby declared to be an *emergency measure* and, provided it receives the affirmative vote of two-thirds of all elected members of Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law. July 18, 1977." (Emphasis added).

RELATED ORDINANCE

"Section 343.01 *Local Retail Business District.*[2]

(b) *Permitted Buildings and Uses.*

The following buildings and uses are permitted in a Local Retail Business District; no buildings or premises shall hereafter be erected, altered, used, arranged or designed to be used, in whole or in part for other than one or more of the following specified uses, and there shall be no display of goods in front of a setback building line.

(1) Except as otherwise provided in this Zoning Code, all uses permitted and as regulated in the least restricted Residence District adjacent to any part of such Local Retail Business District.

* * *

(3) Business offices: real estate, insurance and other similar offices, and the offices of the architectural, clerical, engineering, *legal, dental, medical or other established recognized professions* but excluding morticians, undertakers and funeral directors, in which only such personnel are employed as are customarily required for the practice of such business or professions and not exceeding a total of five persons at any one time.

* * *

(6) Other main uses: any other neighborhood stores, shop or service similar to the uses listed in this subsection (b) in type of goods or services sold, in business hours, in the number of persons or cars to be attracted to the premises and in effect upon the adjoining Residence Districts.

(7) Accessory uses: only to the extent necessary and normally accessory to the limited types of neighborhood service use permitted under this subsection (b). (Ord. No. 2137-66. Passed May 22, 1967. Effective May 23, 1967)."

[2]The entirety of Section 343.01 appears in the Record.

STATEMENT OF THE CASE[3]

Plaintiff Dr. Richard Derman is a duly licensed physician who specializes in obstetrics and gynecology. He is certified by the American Board of Obstetrics and Gynecology, and has had substantial experience in the family planning field. This includes the performance of first trimester abortion in the low cost outpatient setting.

West Side Women's Services, Inc. [hereinafter "WSWS"] is an Ohio corporation, set up to provide the administrative and non-medical aspects of a family planning practice.

Dr. Derman and WSWS together planned to establish a first trimester abortion service on the west side of

[3]The complaint and exhibits are part of the Record.

Cleveland in the fall of 1977. There was no similar facility in west Cleveland at the time.

On or about May 11, 1977, WSWS signed a ten year lease on a certain professional office space "for use as an abortion clinic . . . in an area zoned for 'local retail business.'" *WSWS v. City of Cleveland, supra*, 450 F. Supp. at 797. (App. 5a).

WSWS proceeded to make improvements, obtain supplies, purchase equipment, and hire personnel, all in anticipation of an opening in late September or thereafter. As admitted by the district court,

> "[p]rofessional medical offices are permitted in these districts by the City zoning ordinances." *Id.* at 797. (App. 5a).

Shortly after certain building permits were issued on the WSWS space, defendants Getz and Keane, city councilmen, introduced an "emergency" ordinance, Section 231.09, to ban abortion services from areas zoned "local retail business district." The ordinance passed the same night, became effective July 18,[4] 1977, and remains in effect.

Dr. Derman and WSWS subsequently brought this action to invalidate the ordinance as an unconstitutional effort to restrict first trimester abortion services. They claimed Fourteenth Amendment rights of privacy, liber-

[4]The date appearing in the opinions below, *June* 18, 1977, is a typographical or otherwise inadvertent error.

[5]Delay between passage and filing is not relevant here. However, possible explanations might include the exploration of other options and locations, plus serious consideration before undertaking this litigation. An earlier abortion clinic case in the same district was held for over seven months. See *Mahoning Women's Center v. Hunter* 444 F. Supp. 12 (N.D. Ohio 1977).

ty, and property. They based federal jurisdiction on 28 U.S.C. §§1331, 1343, and sought relief under 42 U.S.C. §1983 et seq.

On March 1, 1978, almost eight months after passage of the ordinance, the district court issued a memorandum opinion and order. *WSWS v. City of Cleveland,* 450 F. Supp. 796 (N.D. Ohio 1978) (App.4a). Recognizing that the ". . . briefs raise no question of fact, only a question of law. . . ." 450 F. Supp. at 797 (App. 5a), the district court considered solely whether there was "probability of success on the merits," *Id.* at 798 (App. 7a), in the view of that Court.

Dr. Derman and WSWS relied heavily upon *Roe v. Wade;* 410 U.S. 113 (1973), *Sendak v. Arnold,* 429 U.S. 968 (1976) (per curiam), and *Moore v. City of East Cleveland,* 431 U.S. 494 (1977). Plaintiffs pointed out that the ordinance restricted exercise of the *Roe v. Wade* rights by inexplicably limiting the areas where an abortion service could be established, and preventing existing medical services in the area from continuing or adding abortion services in their practice.

At no time did plaintiffs seek any subsidy or medical assistance from the City of Cleveland. Plaintiffs distinguished *Maher v. Roe,* 432 U.S. 464 (1977), in the words of the *Maher* majority, as involving

> "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity. . . ." 432 U.S. at 475.

Plaintiffs noted also the pronouncement that *Maher* "signals no retreat from *Roe* or the cases applying it." *Id.* at 475.

Nonetheless, the district court found in this zoning and land use ordinance "'. . . a value judgement favoring

childbirth over abortion. . . .'" 450 F. Supp. at 798 (App. 6a). This value judgment, passed as an emergency zoning ordinance, enabled the district court to discount any probability of success on the merits, and to deny injunctive relief. The district court also refused to find any impact on a fundamental right.

Plaintiffs appealed to the Sixth Circuit. There a panel declined to address "the merits of the broad and sensitive constitutional issues involved . . ." and found "an insufficient showing that the [trial] court abused its discretion. . . ." (App. 2a). The court affirmed, citing no cases.

The district court opinion rests upon a manifestly incorrect application of *Maher v. Roe* that subordinates *Roe v. Wade*. It urgently requires appellate correction due to the high volume of litigation in this field and the fundamental importance of the rights in question. Accordingly, plaintiffs have brought the case here.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN SHARP CONFLICT WITH *ROE v. WADE, SENDAK v. ARNOLD,* AND *MOORE v. CITY OF EAST CLEVELAND,* BECAUSE IT UPHOLDS THE EXCLUSION OF FIRST TRIMESTER ABORTION SERVICES FROM AREAS ZONED TO ALLOW ALL OTHER MEDICAL & PROFESSIONAL PRACTICES.

Roe V. Wade, supra, held that a state may not, in the first trimester of pregnancy, interfere with "the abortion decision and its effectuation." 410 U.S. at 164. These are matters of fundamental privacy between the physician and patient. *Doe v. Bolton,* 410 U.S. 179 (1973), applied the principles of *Roe* to restrictions on the type of facility and procedures for abtaining an abortion at various

stages of pregnancy. Subsequent decisions have clarified issues of standing,[6] third party consent,[7] clinic regulation,[8] and government subsidy.[9] At least one case, *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), has relied in part upon *Roe v. Wade* to invalidate a zoning restriction with adverse impact upon fundamental privacy and family values.

The decision below is completely at odds with the holdings and direction of the cases from *Roe v. Wade* through *Moore v. City of East Cleveland.* It stands, for the present, as a precedent that will be invoked in favor of any and every town council effort to circumvent *Roe v. Wade.*

In four respects the district court committed fundamental error.

First, the court found no impact of the ordinance upon any fundamental constitutional rights. 450 F. at 798. (App. 6a). Other abortion services were found to be available elsewhere in the city. *Id.* The possibility of an alternative, however, does not excuse the passage of a discriminatory and indefensible ordinance. Otherwise, Mrs. Moore in *Moore v. City of East Cleveland, supra,* could have been required to move her family away and to look until she found another home zoned another way.

This petition presents a clearer case than *Moore.*[10] The single family dwelling ordinance was at least even-handed

---

[6] *Singleton v. Wulff,* 428 U.S. 106 (1976).

[7] *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976).

[8] *Sendak v. Arnold,* 429 U.S. 968 (1976) (per curiam), *aff'g* 416 F. Supp. 22 (S.D. Ind.) (three-judge court).

[9] *Maher v. Roe,* 432 U.S. 464 (1977).

[10] The district court chose not to distinguish or even discuss the *Moore* case.

on its face. The ordinance here is abortion-specific. Indeed, this is the type of case envisioned by the dissenting opinion of Justice Stewart in *Moore* as involving rights "constitutionally protected against state interference." 431 U.S. at 536. The present case is more akin to *Buchanan v. Warley*, 245 U.S. 60 (1917), than to *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The *Belle Terre* majority, however, expressly distinguished the type of case involving "rights of privacy," and cited *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

None of these distinctions were dealt with by the district court.

The second fundamental error of the district court was its improper analysis of the City's interest. An abortion-specific zoning ordinance is an unusual place to codify "'a value judgment favoring childbirth over abortion.'" 450 F. Supp. at 798 (App. 6a). There is no evidence of an emergency from decreasing population in Cleveland. As Justice Powell stated in *Moore*, one "need not labor the point. Section [231.09] has but a tenuous relationship to alleviation of the conditions mentioned by the city." 431 U.S. at 500.

A third grave error below was the elevation of *Maher v. Roe*, 432 U.S. 464 (1977), to a standard for substantive restrictions on first trimester abortion services. *Maher* expressly "signals no retreat from *Roe* or the cases applying it." *Id.* at 475. The *Maher* majority carefully distinguished the *Roe* and *Doe* line of cases as involving

> "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity." 432 U.S. at 475.

That crucial distinction was avoided by the district court in favor of dictum taken out of context.

Finally, the district court erred in its treatment of the considerable line of cases that bar overregulation of first trimester abortion practice. E.g., *Sendak v. Arnold*, 429 U.S. 968 (1976), *aff'g mem.* 416 F. Supp. 22 (S.D. Ind.) (three-judge court). Section 231.09 itself is located in a chapter of ordinances that regulate first trimester abortions. It is not even in the zoning ordinances. Section 231.09 regulates abortion services in two respects: WSWS cannot locate in certain areas where any other medical office could locate, and physicians already in such areas may not include abortion "as a primary service or as an integral part of a broader practice. . . ." Cleveland Ordinances, C. 231, *Abortion*, Section 231.01 (d).

Such a restriction on location cannot be justified on any rational basis of health, welfare, patient needs, or medical practice. The sole apparent objective is the restriction of available abortion services. That is not a legitimate objective under the controlling case law.

In sum, the court of appeals and district court made fundamental errors of law which should be corrected by this Court.

II.

THE PETITION RAISES IMPORTANT, RECURRING QUESTIONS ON THE RELATIONSHIP BETWEEN *ROE v. WADE* AND *MAHER v. ROE* IN THE CONTEXT OF NUMEROUS NEW CITY ORDINANCES THROUGHOUT THE UNITED STATES THAT ATTEMPT TO REGULATE, ZONE, AND OTHERWISE RESTRICT THE FUNCTIONING OF ABORTION SERVICES.

The district court interpretation of *Maher v. Roe* opens the way for numerous other efforts to undermine *Roe v. Wade* and *Doe v. Bolton*. If a city may promote popula-

tion growth through discriminatory zoning and medical regulation of first trimester abortion, then only the imagination can set limits on restrictions that will follow.

Considerable litigation has already occurred in regard to unreasonable zoning restrictions on abortion services.[11] Zoning-type restrictions on abortion had little success prior to the present case. For example the City of St. Paul was enjoined by the Eighth Circuit from a six month moratorium on abortion facilities in *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977).

The lower court decision, however, offers renewed encouragement to discriminatory and arbitrary use of the zoning power. The reasoning below is directly at odds with that in the other abortion-zoning case, and presents an arguable conflict of circuits on the merits as well as the criteria for injunctive relief.

Similarly, much litigation has occurred over city regulations that burden the abortion decision and its effectuation. Detailed clinic regulations have been passed and struck down in many jurisdictions.[12] This Court in *Sendak v. Arnold*, 429 U.S. 968 (1976) (per curiam), summarily affirmed one such decision. 416 F. Supp. 22 (S.D. Ind.) (three-judge court).

---

[11] E.g., *Fox Hill Surgery Clinic, Inc. v. City of Overland Park*, ___ F. Supp. ___ (D. Kan. July 11, 1977) (Civ. No. 77-4120); *Framingham Clinic v. Board of Selectmen*, 367 N.E. 2d 606 (Mass. 1977).

[12] E.g., *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974); *Mahoning Women's Medical Center v. Hunter*, 44 F. Supp. 12 (N.D. Ohio 1977); *Mobile Women's Medical Clinic v. Bd. of Commissioners*, 426 F. Supp. 331 (S.D. Ala. 1977).

The lower court decision and its view of *Maher v. Roe* offer new arguments for a revival of regulations such as those involved in *Sendak*. That probability should be prevented by prompt review and reversal of the decision below in this Court.

III.

THIS COURT SHOULD REVIEW THE JUDGMENT BELOW BECAUSE THE DENIAL OF INJUNCTIVE RELIEF IS AN ABUSE OF DISCRETION THAT JEOPARDIZES THE EFFECTIVE EXERCISE OF FUNDAMENTAL PRIVACY RIGHTS.

The decision below is in conflict with *Doran v. Salem Inn*, Inc., 422 U.S. 922 (1975), and with the interpretation of *Doran* by the Eighth Circuit in *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977). Plaintiffs presented a case for preliminary injunction below far stronger than that which warranted such relief in *Dorean v. Salem Inn*, 422 U.S. 922, 932 (1974). WSWS and Dr. Derman alleged injury not only to patients who would be turned away, but also of the same nature as noted in *Doran, supra*,

> "that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy." *Id.* at 932.

The equipping of a medical office and maintenance of a ten year lease are clearly an economic burden that becomes more serious each day. This Court has granted or upheld temporary injunctive relief pending appeal on many occasions to protect fundamental privacy rights and property rights. For example, the Court in *Planned Parenthood v. Danforth*, 420 U.S. 918 (1975) (per curiam), granted a stay pending appeal of the three-judge court decision in 392 F. Supp. 1362 (E.D. Mo. 1975).

Similarly, the Court in *Nichol v. Kennan*, 404 U.S. 1055 (1972) (per curiam), affirmed a lower court granting of temporary injunctive relief against a Wisconsin abortion law. 326 F. Supp. 613 (W.D. Wis. 1971).

The present case is made less complicated by the finding below that "[t]he pleadings and briefs raise no question of fact, only a question of law." 450 F. Supp. 797 (App. 5a). The district court spoke in terms of upholding the ordinance as a matter of law. Accordingly, this Court may reverse the judgment below as an incorrect application of legal principles. The high probability of success on the merits, plus the injury already incurred, warrant reversal with directions to enter injunctive relief.

CONCLUSIONS

For the reasons set out, the Court should grant this Petition and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

ROY LUCAS, P.C.
Suite 604
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 338-6955

By:_____
Roy Lucas

Attorney for Petitioners.

September 15, 1978

APPENDIX

[Filed August 15, 1978]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

78-3160 ORDER

WEST SIDE WOMEN'S SERVICES, INC., et al.,

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, et al.,

Defendants-Appellees.

Before: EDWARDS, ENGEL and MERRITT, Circuit Judges

This is an interlocutory appeal from an order of the district court denying plaintiffs' application for the issuance of a preliminary injunction prior to any hearing on the merits. Plaintiffs sought to forbid the enforcement by the City of Cleveland of an ordinance passed by the Cleveland City Council on June 18, 1977, which prohibits the issuance of abortion service licenses in local retail districts of the city. Cleveland, Oh., Codified Ordinances § 231.09.

In denying interlocutory relief, the district court found that plaintiffs had failed to satisfy the trial court of the probability of their success on the merits.

The range of discretion of the district judge in granting or denying preliminary injunctive relief in advance of any ultimate hearing on the merits is necessarily broad, and

this court is particularly reluctant to disturb that judgment in the absence of a clear showing of abuse. While on the limited facts before us we are unable to reach even a tentative conclusion as to the ultimate merits of the case, and express no opinion thereon, we cannot find an abuse of discretion in the denial of preliminary injunctive relief, particularly since an injunction would run against the operation of a municipal ordinance with the attendant issues of comity and federalism at stake.

While each party to the appeal has urged this court to make a final adjudication on the merits of the broad and sensitive constitutional issues involved, we decline to do so, concluding that we should reserve judgment until after any final judgment has been entered upon a completed record in the district court. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed on the ground that there has been an insufficient showing that the court abused its discretion in denying preliminary injunctive relief, but expressly without making any determination on the merits of the constitutional issues involved.

IT IS FURTHER ORDERED that upon remand, the district court shall expedite any final hearing on the merits of the case to the extent consistent with its obligation to hear any matters enjoying a higher priority.

Entered by Order of the Court
John P. Hehman, Clerk

By_____
Grace Keller, Chief Deputy

WEST SIDE WOMEN'S SERVICES INC., et al., Plaintiffs,

v.

CITY OF CLEVELAND, et al., Defendants.

No. C77-1112.

United States District Court, N.D. Ohio, E.D.

March 1, 1978.

* * *

MEMORANDUM OPINION AND ORDER

BATTISTI, Chief Judge.

Plaintiffs, a physician and a clinic corporation, have rented facilities for use as an abortion clinic on the west side of Cleveland in an area zoned for "local retail business." Professional medical offices are permitted in these districts by the City zoning ordinances. On June 18, 1977, the City Council passed, as an emergency measure, section 231.09 of the Codified Ordinances of the City of Cleveland, entitled "Prohibition Against Issuing Abortion Service License in Local Retail District." Section 231.09 is a part of Chapter 231 of the Codified Ordinances, which regulates abortion services and sets licensing standards.

At the time section 231.09 was passed and signed into law by the Mayor, plaintiffs had obtained a lease on the premises and had secured a zoning permit for the desired use. They had not requested a license to open an abortion clinic as required by Chapter 231.

Plaintiffs allege that the actions of defendants contravene plaintiffs' rights under the due process and equal protection clauses of the fourteenth amendment by preventing plaintiff, Dr. Derman, from treating patients and by causing economic damage to plaintiff clinic, West Side Women's Services, in contravention of the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Sendak v. Arnold*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976), and *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). In addition, plaintiffs raise the privacy rights of prospective patients who they allege will be emotionally and financially damaged by being denied medical care or being required to seek alternatives to abortion. Such harm, plaintiffs allege, will be irreparable, entitling them to preliminary injunctive relief. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1974). The federal questions thus raised give this Court jurisdiction under 28 U.S.C. §1331, 1343.

Defendants argue that the ordinance in question does not interfere with a fundamental constitutional right, and thus must be judged by a rational basis test. Using such a test, defendants allege that the ordinance is a proper exercise of police power by the city. According to defendants, the economic harm claimed by plaintiffs is not irreparable, and does not entitle plaintiffs to preliminary injunctive relief.

The pleadings and briefs raise no question of fact, only a question of law.

Defendants do not dispute that at least Dr. Derman has standing to raise the privacy rights of his patients. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). If defendant's actions interfere with a fundamental constitutional right of either plaintiffs or their

patients, those actions must be taken in furtherance of a compelling state interest. If there is no such infringement, however, defendants' actions must be judged on the basis of their rational relationship to a legitimate state interest.

In its recent decisions on the abortion issue, the Supreme Court has isolated two fundamental rights derived from the right to privacy which are constitutionally protected from state interference. In the first trimester of pregnancy, the state cannot interfere with either the abortion "decision" or with the "physician-patient relationship" unless there is a "compelling" countervailing state interest. *Singleton, supra*, 428 U.S. at 81, 96 S.Ct. 2868. Not all distinction between abortions and other medical procedures is forbidden. *Id.* at 149, 96 S.Ct. 2868.

In *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), the Supreme Court recognized a legitimate state interest in promoting live births over abortions as an alternative method of dealing with pregnancy.

> *Roe v. Wade* . . . did not declare an unqualified "constitutional right to an abortion" . . . Rather, the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion . . . .

Id., 432 U.S. at 473, 97 S.Ct. at 2382 (emphasis added). Defendants' decision to permit professional medical offices to operate in local retail business districts, but to deny abortion clinics that right, appears to be consonant with such a "value judgment." Therefore, the ordinance

can be said to bear a rational relationship to a legitimate state interest. *Cf., Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

The decision to ban abortion clinics from certain areas of the City does not "unduly burden" either the abortion decision or the physician-patient relationship. Women who wish to obtain abortions have access to services in other areas of the City. That such services exist is shown by the list included in the affidavit of Joyce E. Redon (defendants' Exhibit "B"). This is a different case from those relied upon by plaintiffs in which abortion clinics were effectively banned from an entire political subdivision. *See, e.g., Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861 (8th Cir., 1977) (city passed moratorium on building of abortion clinic which would have been a unique facility in city); *Framingham Clinic, Inc. v. Board of Selectmen of Southborough,* 367 N.E.2d 606 (Mass.Sup.Jud. Ct.1977) (abortion clinics declared prohibited use for entire town); *Kennan v. Nichol,* 326 F.Supp. 613 (W.D. Wis. 1971), *aff'd* 404 U.S. 1055, 92 S.Ct. 735, 30 L.Ed.-2d 743 (1972) (statute required all abortions to be performed in "licensed maternity hospital").

Nor does the portion of the abortion ordinance in question, section 231.09, attempt to regulate the method of providing first trimester abortions or the type of facilities which may be used, as did the Indiana statute held unconstitutional in *Sendak v. Arnold,* 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976), *affirm'g* 416 F.Supp. 22 (S.D.Ind.), and the Youngstown statute in *Mahoning Women's Center v. Hunter,* 444 F.Supp. 12 (N.D.Ohio, 1977).

Neither do plaintiffs have a fundamental right to perform abortions. Assuming plaintiffs do have a fundamental right to "property," *i.e.,* running a business, pursuant to the fourteenth amendment, that right is no more abridged by this ordinance than by any zoning law. Plaintiffs do not seriously question defendants' authority to restrict certain uses to appropriate areas of the City. Plaintiffs are not prevented from treating their patients—they are only restricted as to the location of their facilities.

Thus, plaintiffs fail to meet the primary requirement for granting a preliminary injunction—probability of success on the merits. *Virginia Petroleum Jobbers Ass'n v. FPC,* 104 U.S.App.D.C. 106, 259 F.2d 921 (1958). This failure makes it unnecessary to consider the other issues raised by plaintiffs' Motion.

IT IS THEREFORE ORDERED that plaintiffs' Motion for Preliminary Injunction be denied.